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Draft Model Law on Electronic Transferable Records

Compilation of comments by Governments and international organizations

Addendum

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II. Compilation of comments

A. States

9. China

[Original: Chinese]

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Proposed Changes to Draft Model Law on Electronic Transferable Records

On the Model Law

1. Article 4

It is suggested to clarify the provisions in the Model Law that can be derogated, in light of the mandatory nature of most national laws on transferable documents or instruments.

2. Article 6

It is suggested that the words “as permitted by law” be inserted after the word “information”, so that the article would read as follows: “Nothing in this Law precludes the inclusion of information *as permitted by law* in an electronic transferable record in addition to that contained in a transferable document or instrument.” Such qualification is justified on possibilities that substantive laws might not allow certain entries in some transferable documents or instruments, for example, in some countries where cheques are not allowed to have entries on interests and would be considered invalid if such entries are made. Without the proposed qualifier “*as permitted by law*”, this article might induce an interpretation that is in conflict with substantive laws.

3. Article 10

(1) It is suggested that the title for article 10 be changed to “Transferable documents or instruments”. First, that would be in line with the naming style of other articles in the Model Law. This article is about an electronic record to be functional equivalent to a transferable document or instrument when the law requires a transferable document or instrument, therefore, it should be named after what is to be equivalent to. Furthermore, its current title “Requirements for the use of an electronic transferable record” is easily to be confounded with the title of Chapter III, which is “Use of electronic transferable record”.

(2) It is suggested that the different language versions of article 10, subparagraph 1(b)(i) be aligned in order to express the notion of “single” with an explicit term in all six languages. Currently, a specific term is used in three language versions, and the “singular noun prefixed with the definite article” approach is applied in three other language versions, for the

expression of that notion. The latter approach creates two problems. First, the “article plus noun” formulation does not underscore the explicit requirement for “singleness”, and may result in confusing interpretation; second, it leads to inconsistency between different language versions. It is already the common understanding among different countries, as well as a core requirement throughout the Model Law, that for each corresponding right there could be only one electronic transferable record. Therefore, it is justified, and proved possible, to find a right term to express that requirement in the former three language versions. The word “single” used in the Explanatory Note might be an option.

It might be necessary to point out that the “exclusive control” is not a substitute for the “single electronic transferable record” (single ETR) requirement. While the single ETR ensures the right ensuing from control that is exercised over the only object (i.e. ETR), the exclusive control ensures that only one subject is given the right deriving from its control over the ETR. In any case there must be an object to control, and it is not possible to talk about control but not about what to control. In the case of Model Law, the object to control is ETR. Apparently, control over one ETR when there are more than one cannot ensure it is the single right, because other people could have control over the rest ETRs and obtain rights therefrom. For this reason, the singularity of ETR is a core requirement indispensable under the Model Law.

(3) It is suggested to insert the word “exclusive” before the word “control” in article 10, subparagraph 1(b)(ii), so as to be aligned with the wording “exclusive control” in article 11.

4. Article 11

(1) It is suggested to change the title of article 11 to “Possession”, in that this article is about functional equivalence of “possession”, and its current title “Control” deviates from the naming style of other articles in the Model Law, failing to reflect the substance of this article correctly. Under this article, equivalence for “possession” is fulfilled only when a method meets the two requirements set out in paragraph 1. To use “Control” as its title would trigger discussion on the interactions between “control” and the two requirements set out in paragraph 1 and between “control” and “exclusive control”.

(2) It is suggested to insert the word “publicly” before the word “identify” in subparagraph 1 (b), in that “possession”, in addition to being the factual state of transferable documents or instruments, also serves as a way to publicize rights. The functions of “possession” cannot be fully fulfilled without making the fact of exclusive control publicly known.

(3) It is suggested to insert the word “exclusive” before the word “control” in paragraph 2, so as to be aligned with paragraph 1.

5. Article 12

It is suggested to include reliability of method in the list of factors which, as currently drafted, are mainly about reliability of computer systems, even though a reliable computer system does not lent itself to a reliable method. “Wide applicability of a method”, “maturity of the technology in use” and “rationality of a technical route” are examples of factors to be considered for possible inclusion.

6. Article 13

It is suggested to formulate along the line of “functional equivalence”, that is, “Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record”. Current formulation is not in line with the formulation of other articles, which may give rise to questions about what consequences will result from not meeting the requirements of this article.

On the Explanatory Notes

1. It is suggested to reverse the order of “technological neutrality” and “functional equivalence”, as already agreed, which would accurately reflect their inter-relations.
2. It is suggested to delete paragraph 78, in which reference to “other legislation on electronic transferable records” may lead to difficulties in understanding what it specifically refers to. In the case that the paragraph will be retained, it is suggested to confine its discussion to the difference between “single” and “unique”.
3. It is suggested to delete paragraph 80, in which the specific reference to a reliable method in subparagraph 1(b)(ii) may create an assumption that the reliable method mentioned in that subparagraph is different from the reliable methods in other articles.
4. It is suggested to change “the holder of the electronic transferable record” mentioned in paragraph 94 to “the person in control of the electronic transferable record”. This is because a “holder” is vis-à-vis a transferable document or instrument, not an electronic transferable record, which only has a “person in control”. During the discussion of the Model Law, there was a definition of “a person in control of an electronic transferable record”, but it was decided later to delete it and to change “holder” throughout the Model Law to “person in control” (A/CN.9/804, para.85).